Petition

81-1903

NO.

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

MID-CAROLINA OIL, INC.,
HAPPY WILDCAT OIL COMPANY,

PETITIONERS,

v.

B. W. KLIPPEL, JR.,
SUZANNE MASON KLIPPEL,

RESPONDENTS.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

The questions presented for review are whether the United States District Court for the District of South Carolina erred in granting Respondents' Motion for Summary Judgment in this securities fraud case on the basis that it is barred by the three year statute of limitations contained in a portion of the South Carolina blue sky law where:

a. This Court clearly held, in Ernst & Ernst vs. Hochfelder, 425 U.S. 185 (1976), that an action under Section 10(b) of the Securities Exchange Act of 1934 requires proof of scienter while an action under other sections of the Federal Securities Laws, such as Section 12(2) of the Securities Act of 1933, require mere proof of negligence and are therefore endowed with their own limitations periods.

b. The South Carolina Securities Act, as do most blue sky laws which were drafted directly from the Uniform Securities Act, clearly copies the regulatory and remedial schemes of the Securities Act of 1933 and Securities Exchange Act of 1934 and must be interpreted in the same manner as the Federal Acts.

c. The South Carolina Securities Act contains separate provisions addressing securities actions in negligence and actions in fraud giving only the actions in negligence a specific limitations period.

d. The State of South Carolina, as well as numerous other jurisdictions, provides a general limitations period for actions, including fraud, not limited by other, more specific statutes, and such general limitations

period tends to be longer than the other, more specific limitations periods.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Mid-Carolina Oil, Inc. and Happy Wildcat Oil Company pray that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit entered in this case on January 14, 1982.

OPINIONS BELOW

The Opinion and Order of the District Court issued March 19, 1981, is unreported and a copy is attached hereto in the Appendix at p. 1a.

The opinion of the United States Court of Appeals for the Fourth Circuit is unreported and a copy is attached hereto in the Appendix at p. 23a.

JURISDICTION

An opinion and order granting summary judgment in favor of Respondents on the grounds that Petitioners' Federal Securities Laws violations were barred for failure to assert the Federal claims within the three-year limitation period provided by Section 35-1-1530 of the South Carolina Securities Act was entered on March 19, 1981, by the Honorable Robert F. Chapman of the United States District Court for the District of South Carolina.

On January 14, 1982, the United States Court of Appeals for the Fourth Circuit affirmed the judgment below. No rehearing was requested nor was an extension of time within which to petition for certiorari sought.

The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES, ORDINANCES AND REGULATIONS INVOLVED

This case involves the Securities Act of 1933, 15 U.S.C. §§77a et seq.; the Securities Exchange Act of 1934, 15 U.S.C. §§78a et seq.; Securities and Exchange Commission Rule 10b-5, 17 C.F.R. 240.10b-5; the South Carolina Securities Act, Sections 35-1-10, et seq., of the Code of Laws of South Carolina, (1976), as amended; Section 15-3-530 of the Code of Laws of South Carolina, (1976), as amended.

Pertinent portions of the foregoing statutes and rules are reproduced in the Appendix hereto.

STATEMENT OF CASE

Mid-Carolina Oil, Inc. [hereinafter "Mid-Carolina"] and Happy Wildcat Oil Company [hereinafter "Happy Wildcat"] filed a Complaint in the United States District Court for the District of South Carolina on August 21, 1978. Petitioners sought compensatory and punitive damages as well as recisionary relief against B. W. Klippel, Jr. and Suzanne Mason Klippel, Husband and Wife, for injuries arising out of the exchange of an assignment of certain oil and gas leases in Kansas for stock in Happy Wildcat in and around October of 1972. The Complaint contained Federal Securities Laws claims related to fraudulent activity surrounding the purchase and

sale of stock and two (2) State Common Law fraud claims.

Mid-Carolina was the owner of the oil and gas leases and the purchaser of the Happy Wildcat stock. Happy Wildcat was the seller of its own stock and the proposed purchaser of the oil and gas leases. B. W. Klippel, Jr. was the President of Happy Wildcat at the time of the transactions who, along with his wife, Suzanne Mason Klippel, became the owners of the oil and gas leases. Following the transaction in question, Mid-Carolina was left with worthless Happy Wildcat stock, and Happy Wildcat never received the leases for which it issued its stock.

The details of the Klippels' fraudulent scheme are as follows:

In September of 1972, Respondent B. W. Klippel, Jr. [hereinafter "Klippel"], representing himself as President of

Petitioner Happy Wildcat Oil Company [hereinafter "Happy Wildcat"], traveled to Columbia, South Carolina where he approached representatives of Petitioner Mid-Carolina Oil, Inc. [hereinafter "Mid-Carolina"], the owners of working interests in and to certain oil and gas leases located in Woodson and Wilson Counties, Kansas. Klippel offered, on behalf of Happy Wildcat, to purchase from Mid-Carolina the working interests in the oil and gas leases in exchange for the payment of certain debts, the purchase of other interests, a small amount of cash and two thousand (2,000) shares in Happy Wildcat, emphasizing that Mid-Carolina would still have an interest in the leases through its ownership of the shares in Happy Wildcat. Following negotiations, Mid-Carolina accepted Klippel's offer and the lease interests were assigned in October of

1972 to Respondents ostensibly for the purpose of obtaining a loan for Happy Wildcat. Happy Wildcat subsequently issued two thousand (2,000) shares of its stock to Mid-Carolina. Respondents thereupon borrowed the sum of Twenty Thousand and 00/100 ($20,000.00) Dollars to purchase for themselves other interests in the oil and gas leases using the newly acquired Mid-Carolina interests as collateral. Respondents thereafter repaid the loan with profits derived from working the oil and gas lease interests assigned to them by Mid-Carolina.

At the Special Meeting of Shareholders held on November 11, 1972, Klippel informed the Shareholders of Happy Wildcat for the first time of the assignment of the oil and gas leases from Mid-Carolina to him and his wife. He told the Shareholders that in all of the transactions, he was acting as the representa-

tive of Happy Wildcat and that the expenses incurred in these activities, exclusive of Klippel's time, was probably Five Hundred and 00/100 ($500.00 Dollars or less. The Shareholders voted to take title to the oil and gas leases from Respondents as previously represented by Klippel to Mid-Carolina. At a Special Meeting of the Board of Directors of Happy Wildcat held on February 24, 1973, the Directors inquired as to when Happy Wildcat would take title to the oil an gas lease interests previously held by Mid-Carolina. At this time, Klippel was operating the leases for the benefit of Happy Wildcat and was contemplating that Happy Wildcat would borrow additional sums of money to operate these leases. Klippel had not transferred any of his stock or other valuable consideration to Happy Wildcat for its issue of two thousand shares (2,000) to Mid-Carolina. At

this meeting, Klippel also began to raise certain issues as possible points of conflict of interest between himself and the company. In his special Notice to Shareholders dated February 25, 1973, Klippel informed the Shareholders of Happy Wildcat of the intention of the Board of Directors of Happy Wildcat to borrow additional moneys to finance the oil and gas leases acquired from Mid-Carolina. This was the last notice given by Klippel regarding the Mid-Carolina oil and gas lease interests and Mid-Carolina was not informed of any failure on the part of Happy Wildcat to purchase the interests. Respondents had, however, maintained the leases in their names, operated the fields and distributed the profits to themselves. In October of 1974, Dr. John A. Watkins, a Mid-Carolina shareholder, was sent by Mid-Carolina to Kansas to investigate

the lack of return on Mid-Carolina's investment, but met with no success. It was not until November of 1977 that Dr. Watkins unravelled the entire transaction and determined that the oil and gas leases were never delivered to Happy Wildcat.

Federal jurisdiction over Petitioners' Federal Securities Laws claims was based upon Section 22 of the Securities Act of 1933 (15 U.S.C. §77v) and upon Section 27 of the Securities Exchange Act of 1934 (15 U.S.C. §78aa). Federal jurisdiction over Petitioners' State Common Law fraud claims was based upon the doctrine of pendent jurisdiction.

Respondents filed their Answer on January 4, 1979, raising numerous defenses including an allegation that the limitations period for the Federal claim had run, thereby barring the action. Respondents thereafter filed a Motion

for Summary Judgment on November 5, 1980, contending, inter alia, that the Federal claims were barred by the three-year limitations period of Section 35-1-1530 of the South Carolina Securities Act. Since Federal law provides no limitations period for the implied right of action under Section 10(b) of the 1934 Act, a Federal Court sitting in such an action will apply the most analogous State statute of limitations period, Ernst & Ernst vs. Hochfelder, 425 U.S. 185 (1976). The only choices available in South Carolina were the three-year period of limitations established under the South Carolina Securities Act (Section 35-1-1530 of the Code of Laws of South Carolina, (1976), as amended), the six-year period of limitations applicable to actions for common law fraud and the statutory actions where no other time is fixed by the

state creating the liability (Section 15-3-530 of the Code of Laws of South Carolina, (1976), as amended).

On March 19, 1981, the District Court issued its Order finding that the three-year limitations period of the South Carolina Securities Act provided the appropriate and most analogous limitations period for Petitioners' Federal Securities Laws claims despite the fact that the same judge had held two (2) years before in a well-reasoned Opinion that the general South Carolina fraud limitations period of six (6) years would be more appropriate. The District Court felt it had no choice but to change positions in light of the then recent decision of the United States Court of Appeals for the Fourth Circuit in O'Hara vs. Kovens, 625 F.2d 15 (4th Cir., 1980). The O'Hara Court had found that the shared purposes between Section

10(b) and common law fraud are generalized at best and that the one-year period of limitations of the Maryland Securities Act was more appropriate than the three-year period of limitations applicable under the Maryland Statute of Limitations for fraud. Following the mandate of the United States Court of Appeals for the Fourth Circuit, the District Court imposed the three-year statute of limitations on Petitioners' Federal causes of action. Having also determined that the limitations periods began running in April of 1973 for Happy Wildcat and in October of 1974 for Mid-Carolina, the District Court dismissed Petitioners' Federal claims on the ground of limitation and dismissed all remaining causes of action as well.

On April 10, 1981, Petitioners' filed their Notice of Appeal of the District Court's Order, and the matter was

submitted on brief to the United States of Court Appeals for the Fourth Circuit on November 5, 1981. On January 14, 1982, the United States Court of Appeals for the Fourth Circuit issued its per curiam opinion affirming the District Court solely on the basis of its previous opinion in O'Hara vs. Kovens, supra.

REASONS FOR GRANTING THE WRIT

Review is necessary to resolve the existing conflict and chaos in and among the Federal Circuits resulting from their failure to follow this Court's holding in Ernst & Ernst vs. Hochfelder.

While at first glance this Petition appears to be a mere repetition of those submitted in O'Hara vs. Kovens, cert. denied 449 U.S. 1124 (1981), and Carothers vs. Rice, cert. denied 450 U.S. 998 (1981), Petitioners in those cases did not recognize or address the actual controversy among the various Circuits

of the United States Court of Appeals. The difficulty arises not from the variance in the State laws, but the absolute refusal of some Circuit Courts to recognize or adhere to the holdings of this Court in Ernst & Ernst vs. Hochfelder, 425 U.S. 185 (1976). There can be no assessment or determination of "the most analogous State statute of limitations" for a Section 10(b) action unless and until the Courts follow the Hochfelder guidelines.

In Hochfelder, this Court firmly established that the language drafted by Congress in Section 10(b) is addressed only to practices that involve some element of scienter and cannot be read to impose liability for negligent conduct alone. In reaching that conclusion, this Court identified a tripartite legislative framework:

> In each instance that Congress created express civil liability in favor of purchasers or sellers of securities, it clearly specified whether recovery was to be premised on knowing or intentional conduct, negligence, or entirely innocent mistake.

425 U.S. at 207.

This Court went further to state that:

> We also consider it significant that each of the express civil remedies in the 1933 Act allowing recovery for negligent conduct, see §§11, 12(2), 15, 15 U.S.C. §§77k, 771(2), 77o, is subject to significant procedural restrictions not applicable under §10(b). Section 11(e) of the 1933 Act, for example, authorizes the court to require a plaintiff bringing a suit under §11, §12(2), or §15 thereof to post a bond for costs, including attorney's fees, and in specified circumstances to assess costs at the conclusion of the litigation. Section 13 specifies a statute of limitations of one year from the time of the violation was or should have been discovered, in no event to exceed three years from the time of offer or sale, applicable to actions brought under §11, §12(2), or §15. These restrictions, significantly, were imposed by amendments to the 1933 Act adopted as part of the 1934 Act. Prior to amendment, §11(c) contained no provision for payment of costs. Act of May 27, 1933, c. 38, §11(c), 48 Stat. 82.

> See Act of June 6, 1934, c. 404, §206(e), 48 Stat. 907. The amendments also substantially shortened the statute of limitations provided by §13. Compare §13, 48 Stat. 84, with 15 U.S.C. §77n. See 1934 Act, §207, 48 Stat. 908. We think these procedural limitations indicate that the judicially created private damages remedy under §10(b) -- which has no comparable restrictions -- cannot be extended, consistently with the intent of Congress, to actions premised on negligent wrongdoing. Such extension would allow causes of action covered by §§11, 12(2), and 15 to be brought instead under §10(b) and thereby nullify the effectiveness of the carefully drawn procedural restrictions on these express actions. See, e.g., Fischman vs. Raytheon Mfg. Co., 188 F.2d 783, 786 (Ca.2, 1951); SEC vs. Texas Gulf Sulphur Co., 401 F.2d, at 867 868 (Friendly, J., concurring); Rosenberg vs. Globe Aircraft Corp., 80 F.Supp. 123, 124 (E.D. Pa., 1948); 3 Loss, supra, n. 17, at 1787 1788; R. Jennings & H. Marsh, Securities Regulation, 1070 1074 (3d ed., 1972). We would be unwilling to bring about this result absent substantial support in the legislative history, and there is none.

425 U.S. at 208-211.

The importance of the scienter-negligence distinction established by this

Court is what is now being overlooked or outright ignored by some of the Circuits. Almost all of the individual State Securities Acts are taken directly from the Uniform Securities Act which is a direct adaptation of the 1933 Securities Act and 1934 Securities Exchange Act, and establishes the same protective framework created by Congress. The three-year South Carolina limitations period at issue here specifically states that:

> No person may sue under §§35-1-1490 and 35-1-1500 more than three years after the contract of sale.

Section 35-1-1530 of the Code of Laws of South Carolina, (1976), (Cum. Supp. 1977)

An examination of Sections 35-1-1490 (Appendix at 34a) and 35-1-1500 (Appendix at 36a) reveals language that is almost word for word identical with the

language of Section 12(2) of the 1933 Act (Appendix at 28a), which this Court identified in Hochfelder as allowing recovery for negligent conduct. Sections 35-1-1490 and 35-1-1500 do not use the words "manipulative," or "device," which are reserved for Section 35-1-1210 of the South Carolina Securities Act (Appendix at 33a) which is almost word for word identical with Section 10(b) and Rule 10b-5 (Appendix at 27a), which require proof of scienter for recovery. The three-year limitation, however, does not apply to Section 35-1-1210, so South Carolina Courts may look only to the six-year general statute of limitations for State actions commenced under Section 35-1-1210. Therefore, a Federal Court in South Carolina following the precedent of O'Hara vs. Kovens, 625 F.2d 15 (4th Cir., 1980), must apply the three-year limitations period designed

for negligence actions to the Federal 10(b) claim, but would have to apply the six-year limitations period for common law fraud to the identical claim brought under Section 35-1-1210. The only link between Section 10(b) and the South Carolina three-year limitations period is the fact that the limitations period appears in a very limited fashion in the South Carolina Securities Act. The Court in O'Hara made no examination of any substantive connection between Section 10(b) and the limitations period which would apply to a State action based upon identical statutory language. The O'Hara Court simply ignored the Hochfelder scienter distinction in issuing the broad, unsupported declaration that: "By comparison, the shared purposes between §10(b) and common law fraud are generalized at best." O'Hara, supra, 625 F.2d at 18.

Similarly lacking any substantive support for ignoring this Court's holdings in Hochfelder, other Circuits have issued equally broad dismissals of any analysis of State limitations periods based on the scienter-negligence distinction. In arbitrarily dismissing the distinction, the Eighth Circuit stated:

> . . . we believe commonality of purpose weighs more heavily in the final balance if the Federal and State Securities statutes share a substantial congruence in this regard, ...[1]

In the recent case of Hill vs. Der,[2] the United States District Court for the District of Delaware commented that:

> Plaintiffs argue, however, that the essential elements of a 10b-5 action are more identical to a common law fraud suit and specifically point to the necessity of proving scienter in both fraud and 10b-5 actions as the critical factor supporting application of the limitations period for common law fraud.

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[1] Morris vs. Stifel, Nicolaus & Co., 800 F.2d 139, 144 (8th Cir., 1979).

[2] Hill vs. Der, 521 F.Supp. 1370 (1981).

> It is true that liability under §7323 may be predicated on mere negligence while proof of some element of scienter is required to establish actionable common law fraud. The Court believes, however, that selection of the appropriate statute of limitations cannot turn on such simplistic distinctions.

521 F.Supp. at 1384.

All of these decisions indicate that the circuits appear to have forgotten that this Court classified Section 12(2) of the 1933 Act as giving rise to a negligence cause of action because it was controlled by a short limitations period, while Section 10(b) of the 1934 Act was left open to a longer limitations period if necessary. In that distinction or classification lies the real test for finding the most analogous State statute of limitations. The Courts must find first which statutes are available for analysis. They must then decide whether the claim at issue

sounds in negligence or in a claim requiring scienter. Any limitation period established by the State solely for claims in negligence must be discarded from consideration for claims requiring certain scienter, and conversely, any limitation period established by the State solely for scienter-related claims must be discarded for consideration in negligence-related claims. The Court then must choose from the remaining available statutory periods, including the traditional catch-all periods, the statute bearing the most rational relationship to the purpose of the Federal legislation.

There is absolutely no difference between the relationship of Section 12(2) to Section 10(b), and the relationship between South Carolina Section 35-1-1490 and Section 35-1-1210. In

each case, the former is a clear negligence statute and the latter is a clear scienter or intent statute. This pattern of relationship repeats itself throughout the Circuits, but while some of the Circuits recognize it, others do not, thereby creating an illogical disparity not only from Circuit to Circuit, but from Federal Securities Law to State Securities Law. This Court's decision in Hochfelder is the capstone which should bring the Circuits into uniformity not only with each other, but with the State Securities Laws, but so long as Hochfelder is ignored or dispatched out of hand without substantive reason, not only will the Circuits be in disagreement, but there will be absolute chaos in litigating Federal Securities actions in conjunction with State Securities claims.

CONCLUSION

Several of the Circuit Courts of the United States Court of Appeals are omitting that most important step in the analysis of State limitations periods to be applied to Federal Securities claims -- the classification and matching of both the violations and the limitations periods as negligence oriented or scienter oriented. It is not the work of the States that is creating the disparity, they merely copied, in most instances, the language of Congress. It is the refusal of some Circuits to follow the logical and simple guidelines of this Court set forth in Ernst & Ernst vs. Hochfelder, and instead rely upon some more general approach to the "most analogous" test. Adherence to the distinctions enunciated in Hochfelder will provide a uniform system throughout the Federal as well as the State Courts.

For these reasons, Petitioners respectfully request that their Petition for Writ of Certiorari be granted.

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April 13, 1982.

Appendix

APPENDIX

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
COLUMBIA DIVISION

Civil Action No. 78-1481

Mid-Carolina Oil, Inc. and
Happy Wildcat Oil Company

vs.

B. W. Klippel, Jr. and
Suzanne Mason Klippel

Filed: March 19, 1981

David P. Cole, Esquire, Columbia, South Carolina, counsel for plaintiffs.

Jeter E. Rhodes, Jr., Esquire, and Stewart P. Hayes, Esquire, counsel for defendants.

Robert F. Chapman, United States District Judge.

This matter is before the Court upon motion of the defendants for summary judgment as to the federal claims stated in the first cause of action of the com-

plaint and for dismissal of plaintiffs remaining pendent state claims. There is also a motion to dismiss the complaint as to the defendant Suzanne Mason Klippel for lack of jurisdiction as to her.

Several grounds for summary judgment have been extensively argued in briefs submitted by the parties. The primary question is the proper statute of limitations to be applied to the first cause of action in the complaint. This question is complicated by a conflict between this Court's opinion filed January 4,1978 in Civil Action No. 78-749-9, Wilkinson v. E. F. Hutton, et al, and the decision of the Fourth Circuit Court of Appeals in O'Hara v. Kovens, 625 F.2d 15, decided July 16, 1980. In Wilkinson this Court found that the general South Carolina statute of limitations for fraud, which is six years as provided by §15-3-530,

South Carolina Code of Laws 1976, was applicable to a suit brought under the Securities and Exchange Commission Rule 10b-5. However, O'Hara rejected this position in a Maryland case and applied a one year statute of limitation under the Maryland Blue Sky Law, §11-703. This Court finds that the Blue Sky laws of Maryland and South Carolina are so similar and Judge Haynsworth's opinion in O'Hara is so clear that it must be followed in the present case and the three year statute in the South Carolina Blue Sky Law, §35-1-1530 must be applied.

The complaint alleges that plaintiff Mid-Carolina Oil, Inc. is a South Carolina corporation engaged in leasing and operating oil and gas fields and plaintiff, Happy Wildcat Oil Company is a Missouri corporation, domesticated in the State of Kansas and engaged in the busi-

ness of leasing and operating gas and oil fields.

The defendants are husband and wife and citizens and residents of the State of Missouri.

It is further alleged that in September 1972 Mr. Klippel was president of plaintiff Happy Wildcat and proposed to its Board of Directors that an offer be made to the plaintiff Mid-Carolina to purchase Mid-Carolina's interest in an oil and gas lease covering Buffalo Field located in Woodson and Wilson Counties, Kansas. The terms of the offer would exchange 2,000 shares of the common stock of Happy Wildcat to Mid-Carolina for assignment of the Buffalo Field lease. Later in the same month Mr. Klippel traveled to Columbia, South Carolina, met with representatives of Mid-Carolina and offered to purchase its interest in the

Buffalo Field lease for 2,000 shares of Happy Wildcat common stock and other valuable consideration and represented to Mid-Carolina that it would then own 17% of the common stock of Happy Wildcat and would thereby retain a 17% interest in the Buffalo Field lease.

That in October 1972 Mr. Klippel mailed to Mid-Carolina an assignment of the Buffalo Field lease by which the lease would be assigned to Mr. and Mrs. Klippel, and by letter of explanation stated that the assignment was for the purpose of obtaining a bank loan for Happy Wildcat. The assignment was executed by Mid-Carolina and later in October 1972 Mr. Klippel obtained a loan from Home National Bank in Eureka, Kansas in the amount of $20,000 and used the proceeds to purchase the interest of one Merton Jeanes in the Buffalo Field. At

about the same time Mr. Klippel caused 2,000 shares of the common stock of Happy Wildcat to be issued in the name of and delivered to Mid-Carolina. This stock was previously authorized but unissued. However, on November 11, 1972, Mr. Klippel represented to the shareholders of Happy Wildcat that he had transferred 2,000 shares of Happy Wildcat common stock owned by him to Mid-Carolina and obtained a personal loan of $20,000 with which he and his wife purchased the Jeanes interest in the Buffalo Field leases.

It is further alleged that Mr. Klippel recommended to the shareholders of Happy Wildcat that they purchase the Buffalo Field leases from the defendants and that said shareholders agreed to do so, and thereafter Happy Wildcat assumed the $20,000 note to Home National Bank

and repaid the same with interest from corporate funds.

It is further alleged that at no time prior to June 28, 1976, did Mr. Klippel own as many as 2,000 shares of Happy Wildcat common stock, and that he has never returned any of his shares to Happy Wildcat, and despite the issuance by Happy Wildcat of 2,000 shares of its common stock to Mid-Carolina and the repayment by Happy Wildcat of the $20,000 note to Home National Bank, and repeated demands from plaintiffs that defendants transfer title in the Buffalo Field leases to Happy Wildcat, the defendants have refused to make such assignment and continue to operate the Buffalo Field and retain the profits therefrom.

Plaintiffs assert that the representations made by the defendants to the plaintiffs were materially false, known

by Klippel to be materially false, and made with the intention that the plaintiffs rely on such representation, and that the plaintiffs were not aware that the representations were false and therefore relied upon the same and had the right to rely upon these representations, all to the plaintiffs' damage.

The complaint contains five causes of action, the first of which alleges manipulative, deceptive and fraudulent scheme under §§10 and 15 of the Securities Exchange Act of 1934, §17 of the Securities Act of 1933 and Securities and Exchange Commission Rule 10b-5.

The second and fifth cause of action allege common law fraud. Cause of action three alleges breach of contract accompanied by a fraudulent act, and a second cause of action is for conversion of profits due plaintiff Happy Wildcat.

Section 15 of the Securities Exchange Act of 1934, 15 U.S.C. §780 is not applicable to the present case because it covers brokers and dealers and the defendants are not alleged to be nor does any evidence indicate that they are brokers or dealers covered by the Securities Exchange Act.

The defendants contend that the alleged violations of §10 of the Securities Act of 1934, Rule 10b-5 and under §17 of the Securities Act of 1933 are all barred by the statute of limitations. Since federal securities laws have no statutes of limitations expressed therein, courts have adopted the practice of applying the statute of limitations of analagous state law. Defendants contend that the South Carolina Blue Sky law, 35-1-490 et seq., S. C. Code of Laws, 1976, is the analagous law and contains a three year

limitation in §35-1-1530. This section limits suits to a period of three years after the contract of sale, which in the present case would be October or November 1972. The present action was not filed until August 22, 1978.

In Wilkinson, supra, this Court found that §35-1-1530 applied only to causes of action under §§35-1-1490 and 35-1-1500 and not to other sections of the South Carolina Blue Sky law, particularly §35-1-1210 which provides:

> It is unlawful for any person, in connection with the offer, sale or purchase of any security, directly or indirectly, to:
>
> (1) employ any device, scheme or artifice to defraud;
>
> (2) make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they are made, not misleading; or

(3) engage in any act, practice or course of business which operates or would operate as a fraud or deceit upon any person.

In Wilkinson, supra, this Court reasoned that actions under Rule 10b-5, were analagous to suits for fraud, since they required scienter, and should be governed by the state statute of limitations applicable to actions in fraud. This Court supported the Wilkinson decision with decisions from the Second, Ninth and Tenth Circuits and distinguished the Fourth Circuit decision in Newman v. Prior, 518 F.2d 97 (4th Cir. 1975). However, the Court cannot reconcile Wilkinson with O'Hara, the most recent statement by the Chief Judge of the circuit on the question of the proper statute of limitations. A careful reading of O'Hara and a study of the Maryland Blue Sky law persuades the Court that O'Hara is controlling.

Section 11-703 of the Maryland Corp. & Ass's Code Ann. creates the same offenses, causes of action and limitations as §§35-1-1490, 1500 and 1530 of the South Carolina Code.

Maryland Code §11-301 is identical to South Carolina §35-1-1210 and obviously patterned after Rule 10b-5. These sections having to do with a device, scheme or artifice to defraud contain no separate statute of limitations, but O'Hara conclusively holds that the limitation contained in Maryland §11-703 controls actions brought under Federal Security laws.

Judge Haynsworth stated at page 18:

> When borrowing a state statute of limitations for federal purposes, a court should look to the statute which most clearly addresses the same or similar policy considerations as are addressed by the federal right being asserted. It is not necessary that the state statute operate in the same

> fashion as the federal scheme, nor is it necessary that the state statute describe a cause of action identical to the federal cause at issue. (citations omitted) There simply must be a commonality of purpose between the federal right and the state statutory scheme so that it is reasonable to subject the federal implied right to the statute of limitations provided by state law. By comparison, the shared purposes between section 10b and common law fraud are generalized at best. In Fix v. Cane-Miller Corp., 542 F.2d 914, 918 (4th Cir. 1976), we held that the statute of limitations found in Maryland's blue sky law, Md. Corp. & Ass's Code Ann. section 11-703(f), would be applicable to implied actions arising under §10(b). We see no reason to stray from that holding.

Following this reasoning the Court concludes that the three year statute of limitations in §35-1-1530 is applicable. This statute begins to run from the date of the contract of sale, which in the present case would be sometime in October 1972. However, plaintiffs contend that

the Court should apply the Federal Equitable Tolling Doctrine, since fraud is alleged, and this would prevent the action from being time barred under the plaintiffs' theory of the case.

Federal law has long held that where fraud is involved in an action, at law or in equity, the statute of limitation is tolled. Holmberg v. Armbrecht, 327 U.S. 392 (1946).

In the District Court opinion in O'Hara, 473 F.Supp. 1161 (D.Md. 1979) at page 1166, the Court quotes with approval the language from Hupp v. Gray, 500 F.2d 993, 996 (7th Cir. 1974) as follows:

> the statute of limitations in a §10(b) action may be tolled by the "equitable doctrine" of fraudulent concealment. In order to invoke this doctrine, however, the plaintiff must have remained ignorant of the fraud "without any fault or want of diligence or care on his part." Bailey v. Glover, 88 U.S. (21 Wall.) 342, 348, 22 L.Ed. 636 (1871). It is

> well established that a plaintiff may not merely rely on his own unawareness of the facts or law to toll the statute. * * * The Plaintiff, rather, has the burden of showing that he "exercised reasonable care and diligence in seeking to learn the facts which would disclose fraud." * * * The statutory period "[does] not wait appellant's leisurely discovery of the full details of the alleged scheme."

Certainly, if Happy Wildcat could carry this burden for any length of time, it cannot do so after April 1973. At that time the directors of Happy Wildcat knew that Klippel and his wife owned the lease on the Buffalo Field. At a meeting of the directors in early April 1973 Klippel offered to sell the lease to Happy Wildcat, but the offer was not accepted because Happy Wildcat did not have any money with which to make the purchase or develop the field.

If Klippel had fraudulently concealed

his activities from Happy Wildcat prior to April 1973 by holding the Buffalo Field lease in his and his wife's name, such concealment ended with his offer to sell. At that point in time Happy Wildcat, through its directors, knew that it did not own the Buffalo lease which had been purchased from Mid-Carolina and that title to the lease had never been in Happy Wildcat. The statute of limitations as to Happy Wildcat, if the same was ever tolled by the alleged fraudulent concealment, did not continue to be tolled later than April 1973. Therefore, the action as to Happy Wildcat would be time barred when it was commenced in 1978.

As to Mid-Carolina the record is not as well documented, but there can be no doubt that Mid-Carolina was sufficiently on notice as to Klippel's activities so as to require Mid-Carolina to make a dili-

gent and timely inquiry into the facts, which if made, would have revealed that Klippel had not assigned the Buffalo Field lease to Happy Wildcat.

Mid-Carolina was represented by a proxy at the meeting of Happy Wildcat when the question of the Klippel's offer to sell the lease to Happy Wildcat was discussed in April 1973. In addition Dr. John A. Watkins, a retired Army dentist, who had held the rank of Colonel, and is Mid-Carolina's largest stockholder, went to the oil fields in Kansas not later than October 1974 to meet with Klippel and find out why Mid-Carolina had not received any income from the project.

Dr. Watkins described himself as the official "trouble-shooter" for Mid-Carolina and was acting for its stockholders at the time. He still carries the title of trouble-shooter and is a director and

former president of the corporation. In his deposition Dr. Watkins explains his reasons for going to Missouri and Kansas to meet with Mr. Klippel as follows:

> Q. And you went there and met Mr. Klippel, but what was the purpose of your going there to meet him?
>
> A. To try to find out what was going on. There was no money coming in. The shareholders wanted to know what was going on.
>
> Q. Which shareholders at that time?
>
> A. All of them.
>
> Q. You are talking about Happy Wildcat and Mid-Carolina?
>
> A. In 1974 was mostly, I would say Mid-Carolina in 1974.

It cannot be said that Watkins "exercised reasonable care and diligence in seeking to learn the facts which would disclose fraud."

Watkins had several meetings with Klippel and visited the oil fields with

him. When asked about income from the field, he stated Klippel usually put him off and was evasive, which should have put any reasonable person on notice to check further. Although he was a large stockholder in Mid-Carolina and represented all of the stockholders at the time, Watkins made no effort to see the minute book or financial records of Happy Wildcat. He did not check ownership records in the courthouse to see if the lease had been assigned, or take any other steps to find out what was really going on.

Watkins asserts that Mid-Carolina and Happy Wildcat were not aware of Klippel's scheme to defraud them until his friend Giuseppe Tattatucci figured it out for him in 1977. According to Watkins, Tattatucci played in an orchestra and has now probably died from malnutrition, since he ate

mostly herbs and drank tea. Watkins cannot explain by what reasoning process Tattatucci came to the conclusion that Klippel was defrauding the plaintiffs. He testified Tattatucci had a very high I.Q. and after Watkins told him the facts about the transaction involving the plaintiffs and Klippel, Tattatucci concluded that the plaintiffs had been defrauded by Klippel.

At the time of the assignment of the lease from Mid-Carolina to Klippel and Happy Wildcat's refusal to buy the lease from Klippel, oil was selling for $2 per barrel. The appearance of OPEC and the ten-fold increase in the price of oil may have helped Tattatucci in his deduction, but it does not relieve Mid-Carolina of its burden to exercise reasonable care in 1973 and 1974 in investigating and seeking to learn the true facts about its transaction with Klippel. Surely, the statute

cannot wait upon Mid-Carolina's leisurely efforts or Tattatucci's revelations, and there was sufficient evidence available to Watkins in 1974 to reasonably apprise him of Klippel's alleged scheme not to transfer the lease to Happy Wildcat and to require him to diligently seek to learn the facts which would have disclosed the full extent of Klippel's actions which plaintiffs allege to be fraudulent.

Since the theory of equitable estoppel could not toll the statute past October 1974, the three year statute would have run prior to commencing the suit in 1978, and the action of both Happy Wildcat and Mid-Carolina under §10b-5 are time barred and must be dismissed. Since the plaintiffs' federal claims must be dismissed, the Court must also decline to hear their state claims. "Certainly, if the federal claims are dismissed before trial, even though not insubstantial in a

jurisdictional sense, the state claims should be dismissed as well." United Mine Workers v. Gibbs, 383 U.S. 715 (1966).

In view of the above conclusions it is unnecessary to rule on Mrs. Klippel's motion to dismiss for lack of jurisdiction.

IT IS, THEREFORE, ORDERED that summary judgment be entered for the defendants as to the first cause of action and that the remaining causes of action be dismissed.

AND IT IS SO ORDERED.

ROBERT F. CHAPMAN
UNITED STATES
DISTRICT JUDGE

March 19, 1981
Columbia, South Carolina

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 81-1333

Mid-Carolina Oil, Inc., and
Happy Wildcat Oil Company,

Appellants,

versus

B. W. Klippel, Jr., and
Suzanne Mason Klippel,

Appellees.

Appeal from the United States District Court for the District of South Carolina, at Columbia. Robert F. Chapman, Judge.

Submitted: November 5, 1981.
Decided: January 14, 1982

Before WINTER, Chief Judge, and RUSSELL and MURNAGHAN, Circuit Judges.

(David P. Cole, Iseman, Cole & Medlin on brief) for Appellants; (Jeter E. Rhodes, Jr., Stewart P. Hayes, Whaley, McCutchen, Blanton & Rhodes on brief) for Appellees.

PER CURIAM:

This appeal is from the entry of summary judgment in favor of the defendants/appellees by the district court as to the federal claims, and of an order of dismissal of the remaining pendent state claims of the plaintiffs/appellants. The plaintiffs/appellants in their complaint allege violations by the defendants/appellees of Section 17 of the Securities Act of 1933, Sections 10 and 15 of the Securities Exchange Act of 1934 and Rule 10b-5 of the Securities and Exchange Commission, and numerous state claims relating to alleged fraudulent conduct of the appellees in the assignment by appellant Mid-Carolina Oil, Inc. of certain oil and gas leases in exchange for shares in appellant Happy Wildcat Oil Company. The appellees moved for summary judgment on the ground that the Federal Securities

law claims were barred by the three-year limitations period of Section 35-1-1530 of the Code of Laws of South Carolina (1976 & Cum. Supp. 1977). The district court found that under the decision of O'Hara v. Kovens, 625 F.2d 15 (4th Cir. 1980), clearly the three-year statute was applicable in this case and summary judgment was entered for defendants/appellees as to the first cause of action, and the remaining pendent state causes of action were dismissed. This appeal followed.

Upon consideration of the record and the written briefs, we affirm the judgment of the district court upon its well-reasoned opinion. Mid-Carolina Oil, Inc. and Happy Wildcat Oil Company v. B. W. Klippel, Jr., C/A 78-1481-9 (D.S.C.) March 19, 1981.

AFFIRMED

Securities Exchange Act of 1934, § 10
15 U.S.C. § 78

Manipulative and deceptive devices

It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange --

(a) To effect a short sale, or to use or employ any stop-loss order in connection with the purchase or sale, of any security registered on a national securities exchange, in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

(b) To use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered,

any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

Securities Exchange Commission Rule 10b-5
17 C.F.R. §240.10b-5

Employment of manipulative and deceptive devices

It shall be unlawful for any person directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails or of any facility of any national securities exchange,

(a) To employ any device, scheme, or artifice to defraud,

(b) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made,

not misleading, or

(c) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person, in connection with the purchase or sale of any security.

Securities Act of 1933, §12(2), 15 §771(2)

Sec. 12(2). Any person who:

* * * * *

(2) Offers or sells a security (whether or not exempted by the provisions of section 3, other than paragraph (2) of the subject section (a) thereof) by the use of any means of instruments of transportation or communication in interstate commerce or of the mails, by means of a prospectus or oral communication, which includes an untrue statement of a material fact or omits to state material facts necessary in order to make the statements,

in the light of the circumstances under which they were made, not misleading (the purchaser not knowing of such untruth or omission), and who shall not sustain the burden of proof that he did not know, and in the exercises of reasonable care could not have known, of such untruth or omission, shall be liable to the person purchasing such security from him, who may sue either at law or in equity in any court of competent jurisdiction, to recover the consideration paid for such security with interest thereon, less the amount of an income received thereon, upon the tender of such security, or for damages if he no longer owns the security.

Securities Act of 1933, §13, 15 USCA §77m

Limitation of actions

No action shall be maintained to enforce any liability created under section

77k or 771(2) of this title unless brought within one year after the discovery of the untrue statement or the omission, or after such discovery should have been made by the exercise of reasonable diligence, or, if the action is to enforce a liability created under section 771(1) of this title unless brought within one year after the violation upon which it is based. In no event shall any such action be brought to enforce a liability created under section 77k or 771(1) of this title more than three years after the security was bona fide offered to the public, or under section 771(2) of this title more than three years after the sale.

Section 15-3-530.
Code of Laws of South Carolina, 1976
As Amended

Within six years:

(1) An action upon a contract, obligation or liability, express or implied,

excepting those provided for in §15-3-520;

(2) An action upon a liability created by statute other than a penalty or forfeiture;

(3) An action for trespass upon or damage to real property;

(4) An action for taking, detaining or injuring any goods or chattels including an action for the specific recovery of personal property;

(5) An action for criminal conversation or for any other injury to the person or rights of another, not arising on contract, not hereinafter enumerated, and those provided for in §15-3-545.

(6) An action under §§15-51-10 to 15-51-60 for death by wrongful act, the period to begin to run upon the death of the person on account of whose death the action is brought.

(7) Any action for relief on the

ground of fraud in cases which prior to the adoption of the Code of Civil Procedure in 1870 were solely cognizable by the court of chancery, the cause of action in such case not to be deemed to have accrued until the discovery by the aggrieved party of the facts constituting the fraud;

(8) An action on any policy of insurance, either fire or life, whereby any person or property, resident or situate in this State, may be or may have been insured, or for or on account of any loss arising thereunder, any clause or condition in the policy or limitation therein contained to the contrary notwithstanding; and

(9) An action against directors or stockholders of a moneyed corporation or a banking association to recover a penalty or forfeiture imposed or to enforce a liability created by law, the cause of action in such case not to be deemed to have accrued until the discovery by the aggrieved

party of the facts upon which the penalty or forfeiture attached or the liability was created, unless otherwise provided in the law under which such corporation is organized.

Section 35-1-1210
Code of Laws of South Carolina, 1976,
As Amended

It is unlawful for any person, in connection with the offer, sale or purchase of any security, directly or indirectly, to:

(1) Employ any device, scheme, or artifice to defraud;

(2) Make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they are made, not misleading; or

(3) Engage in any act, practice or course of business which operates or would operate as a fraud or deceit upon any person.

Section 35-1-1490
Code of Laws of South Carolina, 1976,
As Amended

Liability to buyers for illegal or fraudulent sales or offers.

Any person who:

(1) Offers or sells a security in violation of subsection (2) of §35-1-170 or §35-1-410 or §35-1-810, or of any rule or order under §35-1-50 which requires the affirmative approval of sales literature before it is used or of any condition imposed under §35-1-950 or §35-1-990; or

(2) Offers or sells a security by means of any untrue statement of a material fact or any omission to state a material fact necessary in order to make the statements made, in the light of the circum-

stances under which they are made, not misleading, the buyer not knowing of the untruth or omission, and who does not sustain the burden of proof that he did not know, and in the exercise of reasonable care could not have known, of the untruth or omission;

Is liable to the person buying the security from him, who may sue either at law or in equity to recover the consideration paid for the security, together with interest at six per cent per year from the date of payment, costs, and reasonable attorneys' fees, less the amount of any income received on the security, upon the tender of the security, or for damages if he no longer owns the security. Damages are the amount that would be recoverable upon a tender less the value of the security when the buyer disposed of it and interest at six per cent per year from

the date of disposition.

Section 35-1-1500
Code of Laws of South Carolina, 1976,
As Amended

Persons jointly and severally liable with seller; contribution.

Every person who directly or indirectly controls a seller liable under §35-1-1490, every partner, officer, or director of such a seller, every person occupying a similar status or performing similar functions, every employee of such a seller who materially aids in the sale, and every broker-dealer or agent who materially aids in the sale are also liable jointly and severally with and to the same extent as the seller, unless the non-seller who is so liable sustains the burdent of proof that he did not know, and in exercise of reasonable care could not have known, of the existence of the facts by reason of which the liability is al-

leged to exist. There is contribution as in cases of contract among the several persons so liable.

Section 35-1-1530
Code of Laws of South Carolina, 1976,
As Amended
Limitations of actions; effect of offer to refund consideration with interest.

No person may sue under §§35-1-1490 and 35-1-1500 more than three years after the contract of sale. No person may sue under either section (a) if the buyer received a written offer, before suit and at a time when he owned the security, to refund the consideration paid together with interest at six per cent per year from the date of payment, less the amount of any income received on the security, and he failed to accept the offer within thirty days of its receipt or (b) if the buyer received such an offer before suit and at a time when he did not own the security,

unless he rejected the offer in writing within thirty days of its receipt.

Opposition

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APPEAL NO. 81-1903

IN THE

Supreme Court of the United States

OCTOBER TERM 1981

MID-CAROLINA OIL, INC.,
HAPPY WILDCAT OIL COMPANY,

PETITIONERS,

v.

B. W. KLIPPEL, JR.,
SUZANNE MASON KLIPPEL,

RESPONDENTS.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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STATEMENT OF THE CASE

The recitation of alleged facts contained in the Petition upon which Petitioners attempted to assert a fraud claim in the Courts below are certainly in dispute. No attempt will be made here to refute such allegations in detail. However, the undisputed facts relevant to the statute of limitations issue before this Court are as follows.

The allegedly fraudulent acts of which the Petitioners complain occurred in 1972. Although the Complaint in this action did not allege any fraudulent concealment of any wrongdoing by the Respondents, the District Court determined that the dates from which the statute of limitations began to run were April of 1973 as to Happy Wildcat and October of 1974 as to Mid-Carolina. For the purposes of the very narrow issue sought to be raised

by the Petition before this Court, the Petitioners concede that the applicable statute of limitations runs from these dates.

The Complaint in this action was not filed in the District Court until August of 1978. If the applicable limitations period were six (6) years as argued by the Petitioners in the Courts below, the Petitioners' suit would be timely. If the applicable limitations period were three (3) years as determined by the District Court in South Carolina and affirmed by the Fourth Circuit Court of Appeals, the action would be time-barred.

The Petitioners seek to have this Court determine the statute of limitations which applies to security law claims pursued in the State of South Carolina.

REASONS FOR DENYING THE WRIT

I. The Instant Case is Not One of Such Peculiar Gravity or Importance to Call For the Granting of Certiorari.

In Lau Ow Bew, 141 U.S. 583, 587 (1891), the Court observed that it was inclined to review "solely questions of gravity and importance." The instant case raises no such question.

In Superintendent of Insurance v. Bankers Life & Casualty Co., 404 U.S. 6, 13 n.9 (1971), this Court established that in some circumstances a private cause of action can be implied with respect to Rule 10b-5, 17 C.F.R. §240.10b-5. In the more recent case of Ernst & Ernst v. Hochfelder, 425 U.S. 185, 210 n.29 (1976), this Court noted that the limitations period for cases brought under §10(b), 15 U.S.C. §78j(b) is to be determined by recourse to the law of the forum state since no federal period exists. In this respect, Hochfelder

followed Holmberg v. Armbrecht, 327 U.S. 392, 395 (1946), "As to actions at law, the silence of Congress has been interpreted to mean that it is federal policy to adopt the local law of limitation."

The upshot of all this is that the district courts in each of the fifty (50) states and the District of Columbia must at some point review local law and determine which of the various state limitations periods that could be applicable to §10(b) will be applicable to 10b-5 suits brought in the forum state.

This unavoidable issue has been, is being, or will be litigated in every forum state in the country. Every such proceeding will have a winner and a loser. Petitioners are such losers.

Petitioners call on this Court to determine an issue of South Carolina law. This issue was determined at the District Court level by a distinguished member of

the federal judiciary from South Carolina, The Honorable Robert F. Chapman. In affirming, the unanimous Fourth Circuit referred directly to Judge Chapman's "well-reasoned opinion." Petitioners' Appendix 25(a). Petitioners want this Court to second-guess Judge Chapman on an issue of South Carolina substantive law.

Petitioners seek to relitigate the issues that were already raised in full before Judge Chapman and before the Fourth Circuit. If these Petitioners may obtain a ruling as to local South Carolina law from this Court in this proceeding, then why should not every losing litigant in every Rule 10b-5 statute of limitations case in each of the other forty-nine (49) states and the District of Columbia have an equal right? Respondents submit that the Writ of Certiorari is not a device to enable litigants to second-guess rulings on local law issues.

The issue raised by Petitioners is not one of such peculiar gravity and importance as to merit the granting of certiorari. Additionally, as discussed below, the alleged legal basis for the granting of certiorari is non-existent.

II. The Court Should Continue to Deny Certiorari in Rule 10b-5 Statutes of Limitations Cases.

Petitioners correctly point out that this Court has twice refused to grant certiorari in 10b-5 limitations period cases. See Carothers v. Rice, 633 F.2d 7 (6th Cir. 1980), cert. denied, 450 U.S. 998 (1981); O'Hara v. Kovens 625 F.2d 15 (4th Cir. 1980), cert. denied, 449 U.S. 1124 (1981). In both Carothers and O'Hara the same decision was reached by the lower court as was reached in this case, namely, that the appropriate limitations period is that found in the state Blue Sky Law. In this case, Judge Chapman expressly followed

O'Hara. See Petitioners' Appendix 3(a).

Petitioners seek to construct a basis for certiorari by relying on the Hochfelder decision. According to Petitioners:

> Hochfelder is the capstone which should bring the Circuits into uniformity not only with each other but with the State Securities Laws . . . .

Petitioners' BR.24.

In truth, Hochfelder is not the capstone of anything related to state securities law or limitations law. It merely points the way by suggesting that state limitations periods govern 10b-5 actions. There is no way to resolve the question of which limitations period governs in a 10b-5 case without scrutinizing local law on a case-by-case, jurisdiction-by-jurisdiction basis. This is a cumbersome and time-consuming process, but it is unavoidable.

Petitioners claim that it was wrong

for the District Court and the Fourth Circuit to rely on the Blue Sky limitations period set forth in S. C. Code Ann. §35-1-1530. This is not so as a matter of law, but if it was, Judge Chapman and South Carolina would not lack for good company. The decision below is in line with great many other circuit court decisions. E.g., Cahill v. Ernst & Ernst, 625 F.2d 151 (7th Cir. 1980) (Wis.); Morris v. Stifel, Nicholaus & Co., Inc., 600 F.2d 139, (8th Cir. 1979) (Mo.); Carothers v. Rice, 633 F.2d 7 (6th Cir. 1980) (Ky.); LaRosa Building Corp. v. The Equitable Life Assurance Society, 542 F.2d 990 (7th Cir. 1976) (Ind.); In re Alodex Corp. Securities Litigation, 533 F.2d 372 (8th Cir. 1976) (Iowa); Hudak v. Economic Research Analysis, Inc., 499 F.2d 996 (5th Cir. 1974), cert. denied, 419 U.S. 1122 (1975) (Fla.); Berry Petroleum Co. v. Adams & Peck, 518 F.2d 402 (2nd Cir. 1975) (Tex.); Hupp v. Gray, 500 F.2d

993 (7th Cir. 1974) (Ill.); Forrestal Village, Inc. v. Graham, 551 F.2d 411 (D.C. Cir. 1977) (D.C.).

The gist of Petitioners' erroneous argument is that the Hochfelder case makes 10b-5 a fraud provision, while the Blue Sky civil remedies provision in South Carolina reaches negligence. Petitioners overlook the crucial fact that: "The general purpose of Blue Sky laws is to protect the public from deceit perpetrated in the sale of securities." Midwest Management Corp. v. Stephens, 291 N.W.2d 896, 901 (Iowa 1980); See also, McElfresh v. State, 151 Fla. 140, 144, 9 So.2d 277, 278 (1942); Terrill v. Hoyt, 149 Kan. 51, 58, 87 P.2d 238, 243 (1939). Note, Blue Sky Legislation, 23 Iowa L. Rev., 102, 103-04 (1937). It most certainly seems logical to look to a statutory framework intended "to protect the public from deceit perpetrated in the sale of securities" in

order to find the limitations period for a 10b-5 claim.

Petitioners' argument that the chief South Carolina civil liability provision, S. C. Code Ann. §35-1-1490, does not reach fraudulent activity is totally meritless. It is true that the statute reaches negligent activity, but this does not mean that fraudulent activity is not remediable under the statute. The statute plainly does reach fraud in the sale of securities. The very caption for §35-1-1490 declares in bold face type: "Liability to buyers for illegal or fraudulent sales or offers." (Emphasis added.)

Another glaring deficiency in Petitioners' position is that the chief ground asserted as a basis for granting certiorari -- a claimed conflict between the decision below and Hochfelder -- is the same ground that was raised, without avail, by Petitioners in Carothers and O'Hara.

See Brief of Petitioners, Carothers v. Rice, No. 80-1238, at 14-15 (1981); Brief of Petitioners, O'Hara v. Kovens, No. 80-580, at 18-19 (1980). Petitioners merely reiterate legal arguments this Court has twice found insufficient to support the grant of certiorari.

It is obvious that the District Court and the Fourth Circuit were correct in their rulings. No public benefit will result from granting certiorari here. So long as there is no federal limitations period for a 10b-5 case, lower courts must continue to search local law to define the applicable limitations period. Granting certiorari in this case will not ease the burden of the federal judiciary one iota.

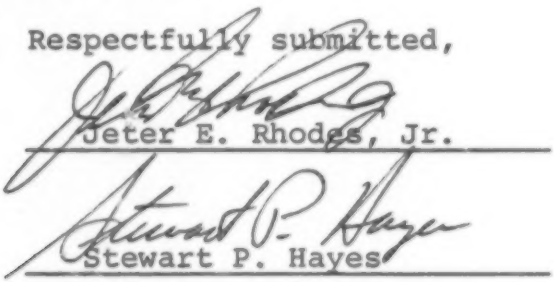
CONCLUSION

The decision of the District Court, unanimously affirmed, is plainly correct. The position of Petitioners herein is

indistinguishable from the positions of Petitioners in Carothers and O'Hara, and the Petitions in those cases were denied.

For the foregoing reasons, Respondents respectfully request that the Petition for Writ of Certiorari be denied.

Respectfully submitted,



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May 14, 1982.

FILING AND MAILING CERTIFICATE OF PRINTER

I hereby certify that on this 14th day of May, 1981, I filed with the Clerk's Office of this Court the required (40) fourty copies of this Brief of Respondents in Opposition to Petition for Writ of Certiorari and further certify that I mailed this same date from Richmond, Virginia the required (3) three copies to Mr. David P. Cole, Esquire, 3700 Forest Drive, Suite 404, Post Office Box 50683, Columbia, South Carolina 29250.

The necessary filing and mailing was performed in accordance with the instructions given me by counsel in this case.

Catherine Johnson

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